JUN 1 1957
JOHN T. FEY, Clerk

No. 179

IN THE

# SUPREME COURT

OF THE

## United States

**October Term, 1956**

THOMAS EISTRAT,
*Petitioner,*
vs.
BRUSH INDUSTRIAL LUMBER COMPANY, a corporation, and JOHN A. BRUSH,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

THOMAS EISTRAT
1020 S. Almansor St.
Alhambra, California
*In his own person.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

*To the Honorable Earl Warren, Chief Justice of the United States of America, and to the Honorable Associate Justices of the Supreme Court of the United States of America:*

The petition of Thomas Eistrat, for a writ of certiorari to be directed to the Supreme Court of the State of California, respectfully shows as follows:

## Reference to Official and Unofficial Reports of Opinions

There was only one opinion delivered or entered in any of the courts below. This opinion (Appendix A hereto) by the District Court of Appeal of the State of California, Second Appellate District, affirming the trial court, is officially reported in 147 A.C.A. 752 (305 P. 2d 715).

## Grounds on Which the Jurisdiction of This Court Is Invoked

The jurisdiction of this Court is invoked under Title 28, Section 1257, United States Code; and petitioner alleges that the following Federal questions are manifest and were raised in the courts below: (a) The State courts disregarded and failed to follow a final judgment entered in the United States District Court in favor of petitioner herein and binding upon respondents, and (b) the courts of the State of California have divested petitioner of his property by denying him equal application of the law and due process of law in contravention of Amendment XIV of the United States Constitution.

## Question Present for Review

Where a California State trial court refuses contrary to California State law to dismiss an unwanted attorney on plaintiff's motion duly made, and plaintiff is thereby prevented from having his day in court and judgment is entered depriving him of his property because there was no trial upon the merits, is a judg-

ment of dismissal without trial in a subsequent action diligently brought to vacate that judgment and enter proper relief in violation of plaintiff's rights as a citizen of the United States under the XIVth Amendment of the United States Constitution.

## Constitutional Provisions Involved

The primary constitutional provision involved is the XIVth Amendment of the United States Constitution.

## Statement of the Case

Petition has to date been prevented from fully presenting his case against respondents to any court. The opinion of the District Court of Appeals is erroneously to the contrary, as will be hereinafter discussed.

Petitioner attempted to present his case against respondents in action 589941 in the Superior Court in and for the County of Los Angeles, State of California, based upon a judgment *in rem* entered in his favor by the United States District Court, Southern District of California, on October 1, 1951. During the trial of action 589941 (judgment on which is herein sought to be vacated and proper relief afforded), petitioner as plaintiff therein against respondents as defendants therein was represented by an attorney Mr. Jerrell Babb until December 29, 1952, at which time plaintiff duly made motion to substitute out Jerrell Babb and recognize plaintiff *in propria persona*. At no time did Jerrell Babb have any power coupled with

an interest in the case; however, the court then refused to order the substitution and thereafter the trial court refused to permit plaintiff any hearing or appearance; and completed its findings and entered judgment against plaintiff on January 13, 1953 (Clk's Tr. pp. 29-31, Certified Record).

Jerrell Babb filed an appeal without authority from plaintiff and the California State appellate courts refused to grant plaintiff a hearing until after remittitur affirming the judgment was entered against him (Clk's Tr. p. 31, Certified Record).

After remittitur was filed against plaintiff and he was then permitted to appear, he employed attorney Bertram Harris to appear for him; whereupon motion to recall remittitur was made and heard on July 26, 1954. The reporter's transcript before the District Court of Appeals on July 26, 1954 shows Mr. Harris stating:

> "It is our position in all the proceedings had before this court and the Supreme Court of this state that our client has not been properly represented by counsel, and that respondents have fraudulently attempted to confuse the issues before the courts and to misrepresent the facts—Upon reading the answer to our petition, respondents again continue, it is our contention, to misrepresent to this court and misapply the facts and the law. To prove this, that the respondents are dancing a jig from one leg to another to continue to confuse the issues and facts and law—This re-

minds me of the Hitler argument—if you tell a falsehood long enough, loud enough and often enough, somebody is bound to believe you.". (Certified Record, Ltr. 3-2-57, Appendix, pp. 1, 2, 5).

Thereafter Alvin Gersheson with Bertram Harris as associate counsel filed petition for writ of certiorari, No. 403, October 1954 Term, United States Supreme Court. No mention was made in that petition of petitioner being denied his day in court or a trial on the merits; nor did that record before this Honorable Court nor before the state appellate courts then show that denial of his day in court. After petition for rehearing calling attention for the first time in any appellate court to the fact that petitioner was denied his day in court by the trial court, it appeared to petitioner this Honorable Court was not thereby sanctioning the denial of his right to a trial in a court of justice with his property at stake, but simply was not passing upon this question as petitioner had not exhausted his remedies in the state courts by not having filed action therein to vacate that judgment because it was obtained while the trial court prohibited his appearance and such point and record had not been presented to the state appellate courts.

This present action 640312 against respondents was then promptly filed to vacate the former judgment and for proper relief, and defendants' demurrer to plaintiff's third amended complaint was sustained without leave to amend and without opinion. In this complaint, plaintiff stated:

"That plaintiff was legally prevented from taking action to protect his right to maintain this action for conversion against defendants, and each of them, by order of above entitled Superior Court in action No. 589941 on December 29, 1952 denying plaintiff's motion to substitute himself in place of his then counsel of record, which denial of plaintiff's right to maintain this cause of action for conversion and to protect his rights continued until further order of said court on June 23, 1954, during which time interval judgment had been entered against plaintiff and remittitur from the District Court of Appeal filed against him without any hearing having been granted plaintiff or plaintiff having his day in court—all aforesaid in contravention of the Fourteenth Amendment of the Constitution of the United States." (Certified Record, Clk's Tr. pp. 27, 28).

On appeal plaintiff raised before each court the issue of his being denied his right to fully present his meritorious case as being in contravention of the XIVth Amendment of the United States Constitution (Certified Record, App. Op. Br. p. 14; App. Pet. for Reh. pp. 14, 20, 26; App. Pet. for Hearing pp. 6, A13). A summarized statement of the merits of the case, with reference to the record, is stated in appellant's opening brief (Certified Record, App. Op. Br. pp. 1-11).

The judgment of the trial court without findings of fact, conclusions of law or opinion entered March 6, 1956 (Certified Record, Clk's Tr. p. 5) was affirmed January 17, 1957 by the District Court of Appeal with opinion (Appendix A, herein) and petition for hear-

ing and application for leave to produce additional evidence in the California State Supreme Court denied without opinion by order entered March 13, 1957 (Certified Record).

## Reasons for Allowance of Writ

The California State Courts have failed to afford petitioner equal protection and due process of law as guaranteed him under the Constitution of the United States and State of California.

The trial court, without any indication of its reasons for so doing, entered judgment of dismissal of petitioner's meritorious case and thereby further denied petitioner due process and equal protection of law in violation of Amendment XIV of the United States Constitution.

The District Court of Appeal took judicial notice of the record in the former appeal, and in contravention of the XIVth Amendment of the United States Constitution erroneously held that "Plaintiff had full opportunity to present his case upon the prior trial, he fully participated therein by counsel, and it was truly an adversary proceeding" (Certified Record, App. Pet. for Hearing, Appendix p. C4; App. herein p. 4).

Petitioner filed a 27-page petition for rehearing in the District Court, setting forth:

1—That the decision of the District Court lacked the concurrence of two justices qualified as re-

quired by section 170a of the Code of Civil Procedure, and,

2—That the opinion of the District Court denied petitioner due process and equal protection of law by not taking as true on appeal the well pleaded allegations of his complaint on which demurrer had been sustained without leave to amend, and,

3—That the decision of the District Court unequally applied the law or did not apply it at all in contravention of the XIVth Amendment of the United States to petitioner's detriment.

Plaintiff filed petition for hearing in the California State Supreme Court, pointing out the contravention of the Fourteenth Amendment of the United States Constitution in the courts below. The petition was denied without opinion, thus further denying petitioner's rights in violation of Amendment XIV of the United States Constitution.

Plaintiff's complaint alleges that in the former action against respondents he was unsuccessful because he was prevented from fully presenting his case, that when fully exhibited he would prevail, that he has been diligent in attempting to present it, and that in the former action it was not fully presented because the trial court refused plaintiff his right to substitute himself in place of his attorney of record who had no power coupled with an interest, thereby denying him due process and equal protection of law in contraven-

tion of the XIVth Amendment of the United States Constitution.

In the former case the trial court refused to equally apply to plaintiff his right established by California law to substitute out his attorney of record who had no power coupled with an interest in the case (*Echlen v. Superior Court*, 13 Cal. 2d 368, 90 P. 2d 63).

There was no record on appeal in the former case to show that denial of plaintiff's rights in contravention of Amendment XIV of the United States Constitution, as plaintiff was not recognized by the courts until after remittitur was entered against him (Clk.'s Tr. p. 31, Certified Record).

That statement in the opinion of the District Court is a gross injustice to petitioner because the record on the prior appeal of which the District Court took judicial notice does not contain matters showing that plaintiff had full opportunity to present his case, or that he fully participated therein by counsel, or that it was truly an adversary proceeding; while the record on the present case shows plaintiff's attorney in the former case refused to be substituted out, had no power coupled with an interest in the case, opposed plaintiff's motion to get him out, the court refused to compel that attorney to withdraw and would not allow plaintiff his right to fully exhibit his case or to appear in court, that plaintiff was by the court's order thereby prevented from exhibiting his case and from making motion for new trial and from having an adequate

record on appeal (Clk's Tr. pp. 28-32, Certified Record).

The statement of attorney Bertram Harris in reference to respondents fraudulently attempting to confuse the issues before the courts and misrepresent the facts in the former action is particularly pertinent as those acts of respondents had taken place while petitioner was diligently attempting to secure a trial upon the merits, and had been so prevented by Jerrell Babb as an attorney wrongfully purporting to represent plaintiff without authority and in contravention of California State law.

It is submitted that petitioner's present action to vacate that former judgment and for entry of proper relief is well within the bounds of the classic case of *United States v. Throckmorton*, 98 U.S. 61, wherein the court stated:

> "A judgment may be set aside at any time where there was in fact no adversary trial or decision of the issue in the case, as where the unsuccessful party has been prevented from fully exhibiting his case, or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat;—these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

It has long been established law in California regarding vacating a former judgment that "the gravamen of the rule thus expressed lies in the fact that 'the unsuccessful party has been prevented from fully presenting his case'.". (*Phillips v. Phillips*, 137 C.A. 2d 651, 290 P. 2d 611; *Bacon v. Bacon*, 150 Cal. 477, 89 (P. 317). The courts below have refused to apply this well established law to the facts as established by the record before them to petitioner's case, thereby contravening the XIVth Amendment of the United States Constitution.

It appears that the courts below have held in reviewing this action to vacate the former judgment and for entry of proper relief, contrary to the law set forth in *Paraco, Inc., v. Dept. of Agri.*, 118 C.A. 2d 348, 257 P. 2d 981, and *Talley v. N. San Diego Hosp.*, 41 Cal. 2d 33, 257 P. 2d 22, that the opinion of the District Court in the former action must be taken as truly setting forth the factual and procedural background for this present action, and that all the well pleaded allegations of the complaint upon which judgment of dismissal was entered after sustaining a demurrer to the pleading must be disregarded. It is submitted such ruling was in contravention of Amendment XIV of the United States Constitution.

Because of the erroneous statements in regard to facts in the opinion of the District Court, it appears necessary that the complete record on appeal in the former action be examined with the record in the present action. It may be noted, however, that unlike the

present opinion of the District Court, respondents did not refer in their briefs to the former record or former opinion of the District Court of Appeals for a statement of facts, but instead did not contest the statement of facts set forth in appellant's opening brief herein.

The dignity of the United States Government will not permit courts of justice to deprive any man of due process and equal protection of law in regard to his property.

## Conclusion

Wherefore, your petitioner prays, for the foregoing reasons, that a writ of certiorari may be issued out of and under the seal of this court to the Supreme Court of the State of California, to the end that the judgment and order of the Supreme Court and Second District Court of Appeal may be reviewed by this Honorable Court, reversing the orders entered by the courts below so that petitioner will have his day in court and a trial upon the merits in accordance with the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

THOMAS EISTRAT,

*In pro se.*

# APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

| | | |
|---|---|---|
| THOMAS EISTRAT, Plaintiff and Appellant, | ) | |
| vs. | ) | Civil |
| BRUSH INDUSTRIAL LUMBER COMPANY, a corporation, and JOHN A. BRUSH, Defendants and Respondents. | ) | No. 21905 |

Dist. Court of Appeal—Second Dist.

FILED Jan. 17, 1957

J. E. BROWN, *Clerk*

....., *Deputy Clerk*

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APPEAL from judgment of the Superior Court of Los Angeles County. Leon T. David, Judge. Affirmed.

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Thomas Eistrat, appearing *in Propria Persona*.

Wendell W. Schooling, Kenneth M. Liskum, for Respondents.

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Plaintiff brought this action to recover damages for the conversion of certain lumber and to vacate a judgment in favor of defendants in an action between the same parties involving the same facts. The prior judgment was affirmed by this court in 124 Cal. App. 2d 42[1] (*Eistrat v. Brush Industrial Lumber Co.*).

Defendants' demurrer to plaintiff's third amended complaint was sustained without leave to amend. Plaintiff appeals from the ensuing judgment of dismissal.

In the instant matter, as in the prior case, plaintiff is seeking damages for the conversion of lumber that he claims belonged to him. He is, of course, met at the outset with the principle of *res judicata*. In order, however, to avoid its application, plaintiff asserts that the prior judgment was the result of extrinsic fraud or mistake.[2] In support of his contention he points to certain allegations in his third amended complaint: that at the trial he requested his attorney to (1) offer available evidence that defendants had not paid anyone for most of plaintiff's lumber; (2) offer in evidence the depositions of R. P. Kratz, vice president of defendant corporation, which showed defendants' defense to be sham and frivolous; (3) offer evidence that a judgment for defendants would be an unjust enrichment of them and a gross miscarriage of justice; (4) offer in evidence written opinion of United States District Court in a bankruptcy pro-

[1]Reference is made to this opinion for the factual and procedural background of this litigaton.

[2]He relies on *Westphal v. Westphal*, 20 Cal. 2d 393; *Chung Gee v. Quan Wing*, 103 Cal. App. 2d 19; and *Bacon v. Bacon*, 150 Cal. 477.

ceeding involving one of the vendees of the lumber (see *Eistrat v. Brush Industrial Lumber Co., supra*, pp. 43, 44 and 45) to the effect that all lumber taken and carried away from plaintiff's land to defendants was the property of plaintiff and his wife;[3] and that counsel refused to follow these suggestions. Plaintiff also alleged he made a motion in the trial court to dismiss his counsel so that he might handle the case himself. His motion, however, was denied. Plaintiff further alleges that counsel carelessly allowed the Clerk's Transcript on appeal to include exhibits that were not in evidence.

In *Westphal v. Westphal*, 20 Cal. 2d 393, the court stated, at page 397, that "The final judgment of a court having jurisdicton over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic. [Citation.] Fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. [Citations.] If an unsuccessful party to an action has been kept in ignorance thereof [citations] or has been prevented from fully participating therein [citation], there has been no true adversary proceeding, and the judgment is open to attack at any time."[4] Measured by these principles, it is clear that plaintiff has not alleged facts entitling him to have the

[3]It appears that the findings of the federal court in the bankruptcy proceedings were received in evidence. (See *Eistrat v. Brush Industrial Lumber Co., supra*, p. 45.)

[4]For the classic definition of "extrinsic fraud" see *United States v. Throckmorton*, 98 U.S. 61, 65.

prior judgment vacated. There is no showing of extrinsic fraud or mistake within the definition of those terms by our courts. (*Westphal v. Westphal, supra; United States v. Throckmorton,* 98 U.S. 61, 65; *In re Griffith,* 84 Cal. 107, 112-113; *Pico v. Cohn,* 91 Cal. 129, 133-135.)

Plaintiff had full opportunity to present his case upon the prior trial, he fully participated therein by counsel, and it was truly an adversary proceeding.[5]

Plaintiff's complaint against his counsel does not warrant vacating the judgment. In *Greenwood v. Greenwood,* 112 Cal. App. 691, the court stated, at page 696: "Equity will not grant relief against a judgment at law, where such judgment was obtained in consequence of the neglect, inattention, mistake, or incompetency of the attorney, unless caused by the opposite party." There is no charge here to bring this case within the stated exception.

The judgment is affirmed.

FOX, J.

We concur:

MOORE, P. J.

ASHBURN, J.

[5]We take judicial notice of the matters contained in the record on the prior appeal to this court. (*Hammell v. Britton,* 19 Cal. 2d 72, 75.) That record discloses that the Reporter's Transcript covers 302 pages, and that the trial consumed some four days.

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## PETITIONER'S REPLY BRIEF

THOMAS EISTRAT
1020 S. Almansor St.
Alhambra, California